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various items of traffic, and accordingly, provide proportionate rates.<sup>20</sup> But as a practical matter, the burden is upon the carrier, when assailing a particular rate, of finding some satisfactory method of apportioning the various costs. The difficulties in the way of this are obvious, and it would seem more salutary that the carrier should not be allowed to complain of a particular rate, but that on the other hand, it should be limited to the right to have a fair return upon its entire investment, interstate or intrastate, as a unit.

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**MORTGAGES ON RAILROAD ROLLING STOCK.**—Although most mortgages purporting to cover rolling stock of a railroad expressly mention such equipment, omission of a clause specifically pledging the cars and locomotives is not necessarily fatal to the claim of the mortgagee. If the phraseology of the instrument be such that inclusion of the rolling stock would amount to a violent straining of the language employed by the parties, the rolling equipment is not subjected to the mortgage.<sup>1</sup> But courts are occasionally willing to adopt liberal interpretations of mortgages placed before them for construction,<sup>2</sup> and if the mortgage comprehend in its terms "all the property" of the railroad company, the rolling stock seems reasonably to be included therein, whether it be considered real property or chattels.<sup>3</sup>

Whether the rolling stock of a railroad forms a portion of the realty of the company or constitutes part of its personalty is a question which has engendered much discussion, given rise to irreconcilable lines of authority and necessitated in many jurisdictions official extra judicial determination, either by statute or by constitutional provision.<sup>4</sup> The recent case of *Booth v. Central Savings Bank* (Colo. 1915) 146 Pac. 240, declaring the rolling equipment of a company to be a part of the realty, follows, on this point, the minority of American decisions, for although in some jurisdictions rolling stock is considered a fixture,<sup>5</sup> in the majority it is regarded as personalty.<sup>6</sup>

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<sup>20</sup>2 Wyman, Public Service Corporations, § 1064.

<sup>1</sup>A mortgage of the "road and its franchise" does not embrace the rolling stock. *Miller v. Rutland etc. R. R.* (1863) 36 Vt. 452, 498.

<sup>2</sup>A mortgage of an entire line of a railroad together with "all the revenue or tolls thereof" was held to cover all the rolling stock needed for the production of tolls and revenues. *Maryland v. Northern etc. Ry.* (1861) 18 Md. 193.

<sup>3</sup>*Meyer v. Johnston* (1875) 53 Ala. 237, 332, s. c. (1879) 64 Ala. 603. *A fortiori*, when the mortgage includes "all the property" "together with the tolls and income therefrom", the rolling stock is comprehended. *Pullan v. Cincinnati etc. R. R.* (C. C. 1865) 4 Biss. 35.

<sup>4</sup>*Jones, Railroad Securities* (3rd ed.) §§ 136, 139, 151. See note to case of *Western Lumber Co. v. Keystone L. & M. Co.* (W. Va. 1902) 66 L. R. A. 33, 49.

<sup>5</sup>*Minnesota Co. v. St. Paul Co.* (1864) 2 Wall. 609; *Elizabethtown etc. R. R. v. Elizabethtown* (Ky. 1876) 12 Bush 233; see *Jones, Railroad Securities* (3rd ed.) § 136. But rolling stock belonging to another and placed upon the railroad temporarily does not become a fixture. *Hardesty v. Pyle* (C. C. 1883) 15 Fed. 778.

<sup>6</sup>*Jones, Railroad Securities* (3rd ed.) § 150; *Williamson v. New Jersey Southern R. R.* (1878) 29 N. J. Eq. 311; *Coe v. Columbus etc. R. R.* (1859) 10 Ohio St. 372, 378. Some state courts have changed the status of rolling equipment from realty to personalty even in the absence of statute. *Cf. Farmers' etc. Co. v. Hendrickson* (N. Y. 1857)

It is a general statutory rule that to insure to the mortgagee of a chattel mortgage a claim superior to that of a subsequent judgment creditor or purchaser for value of the object mortgaged, the chattel must be delivered to the mortgagee and retained in his possession, or the mortgage must be filed or recorded at certain places.<sup>7</sup> But when this rule is applied to mortgages of railroad rolling stock various difficulties arise.<sup>8</sup> Some courts have recognized the difference in character between rolling stock and ordinary chattels and even in the absence of express statutory authority have held that under certain circumstances mortgages of rolling equipment need not be recorded under chattel mortgage acts.<sup>9</sup> Other courts, on the contrary, have applied the rule strictly.<sup>10</sup> To-day, the confusion and uncertainty attending the recording or filing of mortgages of railroad rolling stock has been largely removed by special legislative action, which oftentimes tacitly recognizes the ground midway between realty and personalty occupied by cars and locomotives, by providing for recording mortgages of such equipment under laws bearing the earmarks both of chattel mortgage recording acts and of enactments regulating the registration of mortgages upon real property.<sup>11</sup> In jurisdictions treating rolling stock as fixtures, mortgages embracing it should be recorded, in the absence of special statutory provision, as are recorded mortgages upon realty, in order to protect the mortgagee's interest against creditors and purchasers.

Interesting questions arise when the mortgage embraces after-acquired cars and locomotives. At common law, the mortgagee of after-acquired chattels could not enforce his claim on the chattels unless he could show that they had a potential existence when the mortgage was made. Courts of equity, however, treated such mortgages more liberally, advancing one reason or another in justification of their support of a novel but very convenient method of securing advances.<sup>12</sup>

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25 Barb. 484; *Stevens v. Buffalo etc. R. R.* (N. Y. 1858) 31 Barb. 590; *Beardsley v. Ontario Bank* (N. Y. 1859) 31 Barb. 619; *Hoyle v. Plattsburgh etc. R. R.* (1873) 54 N. Y. 314.

<sup>7</sup>See Jones, *Chattel Mortgages* (5th ed.) §§ 176, 190; *Frank v. Denver etc. Ry.* (C. C. 1885) 23 Fed. 123. In California, an affidavit that the transaction is one of good faith must be made by all the parties at the time of mortgage. Cal. Civ. Code, § 2957; see *Southern California etc. Co. v. Union etc. Co.* (C. C. A. 1894) 64 Fed. 450.

<sup>8</sup>For examples see Jones, *Railroad Securities* (3rd ed.) § 151.

<sup>9</sup>*Cooper v. Corbin* (1883) 105 Ill. 224; *Hammock v. Loan & Trust Co.* (1881) 105 U. S. 77. Apparently, such was the rule at one time in New York. *Bement v. Plattsburgh etc. R. R.* (N. Y. 1866) 47 Barb. 104, *affd.* (N. Y. 1868) 51 Barb. 45. The federal courts usually follow the state statutes providing for recording of mortgages or conditional sales of chattels; see *Heryford v. Davis* (1880) 102 U. S. 235, 247; *Hervey v. Rhode Island Locomotive Works* (1876) 93 U. S. 664; *Frank v. Denver etc. Ry.*, *supra*; although occasionally they seem to take liberties in applying the state enactments. *Southern California etc. Co. v. Union etc. Co.*, *supra*. Of course, as between the immediate parties the mortgage is good, even if unrecorded. 1 Jones, *Mortgages* (6th ed.) § 474; Jones, *Chattel Mortgages* (5th ed.) § 237; *Fosdick v. Schall* (1878) 99 U. S. 235.

<sup>10</sup>*Bishop v. McKillican* (1899) 124 Cal. 321; *Williamson v. New Jersey Southern R. R.*, *supra*.

<sup>11</sup>See Jones, *Railroad Securities* (3rd ed.) §§ 152-168.

<sup>12</sup>See 8 Columbia Law Rev., 307.

It is well settled to-day that after-acquired rolling stock may be mortgaged, although the reasoning employed by the different courts is by no means uniform.<sup>13</sup> The question of potential existence is seldom raised about mortgages upon cars and locomotives, but when it is brought up squarely the courts seem to find little difficulty in discovering a way to protect the rights of the mortgagee.<sup>14</sup> When the mortgagee's claim to the after-acquired rolling equipment is contested by one asserting a vendor's lien or reserving title to the cars and locomotives under a conditional sale, the rights of the mortgagee are usually deemed inferior to those of the contestants because a mortgage covering after-acquired property attaches only to whatever interest the mortgagor acquires, and the property has come to him charged with the lien of the vendor.<sup>15</sup> Furthermore, it is a general rule of railroad law that expenses attending the operation of a railroad may constitute a first claim upon the property of the company, superior even to the rights of mortgagees,<sup>16</sup> and by analogy it seems that this rule should be applied to mortgages of rolling stock.

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CONSTRUCTIVE TRUSTS ARISING FROM CONFIDENTIAL RELATIONS.—According to a few text writers and some courts, the essential element of a constructive trust is fraud. It is urged that if this element be lacking, a true constructive trust cannot arise; and that to hold otherwise would be virtually to abrogate the Statute of Frauds and allow title in land to be disturbed upon parol evidence.<sup>1</sup> Some of the courts, because of their close adherence to this narrow principle, insist that the fraud must appear in the original transaction and be the means by which the conveyance of title was secured.<sup>2</sup> The inequitable consequences of the strict enforcement of such a harsh rule resulted in the invention of the fiction of constructive fraud in order that justice might be realized. Thus it was reasoned that the betrayal of con-

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<sup>13</sup>*Philadelphia etc. R. R. v. Woelpper* (1870) 64 Pa. 366; *Morrill v. Noyes* (1863) 56 Me. 458; *Pennock v. Coe* (1859) 23 How. 117; *Scott v. Clinton etc. R. R.* (C. C. 1876) 6 Biss. 529; *Phillips v. Winslow* (Ky. 1857) 18 B. Monroe 431.

<sup>14</sup>*Philadelphia etc. R. R. v. Woelpper*, *supra*; *Morrill v. Noyes*, *supra*. When the instrument mortgaging after-acquired property is confirmed expressly by the legislature, the mortgage is valid regardless of the question of potential existence. *Howe v. Freeman* (Mass. 1860) 14 Gray 566.

<sup>15</sup>*United States v. New Orleans R. R.* (1870) 12 Wall. 362; *Newgass v. Atlantic etc. Ry.* (C. C. 1893) 56 Fed. 676.

<sup>16</sup>See 1 Elliott, *Railroads* (2nd ed.) § 580; *Newgass v. Atlantic etc. Ry.*, *supra*; *Meyer v. Johnston*, *supra*. It has been held that the claims of mortgagees may be subordinated, by a judicial decree, to a new lien created by order of the court to secure new loans necessary for the continuation of traffic on a dilapidated railroad, either with the consent of the mortgagee, or without it. See cases cited in *Meyer v. Johnston*, *supra*, pp. 341, 338; *Stanton v. Alabama etc. R. R.* (C. C. 1875) 2 Woods 506.

<sup>17</sup>3 Pomeroy, *Eq. Jur.* (3rd ed.) §§ 1044, 1046, 1056; *Noe v. Roll* (1892) 134 Ind. 115; *Davis v. Stambaugh* (1896) 163 Ill. 557; *Barry v. Hill* (1895) 166 Pa. 344.

<sup>18</sup>*Brock v. Brock* (1890) 90 Ala. 86; *Clester v. Clester* (1913) 90 Kan. 638.